STATE OF MICHIGAN

SUPREME COURT

BOARD OF EDUCATION OF THE NORWAY-VULCAN AREA SCHOOLS,

Respondent-Appellant,

v

SUSAN KORRI,

Petitioner-Appellee.

Supreme Court
Case No. 125691

Court of Appeals
Case No. 238811

State Tenure Commission
Docket No. 01-000006

Robert G. Huber (P36092)
THRUN LAW FIRM, P.C.
Attorneys for Appellant
501 South Capitol Avenue – Suite 500
P.O. Box 40699
Lansing, MI 48901
(517) 374-8830

William F. Young (P35656)
WHITE, SCHNEIDER, YOUNG & CHIODINI, P.C.
Attorneys for Appellee
2300 Jolly Oak Road
Okemos, MI 48864
(517) 349-7744

RESPONDENT-APPELLANT NORWAY-VULCAN AREA SCHOOLS' SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

CASE AUTHORITY:

STATUTORY AUTHORITY:

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER RESPONDENT PROPERLY PROVIDED AN ANNUAL YEAR-END PERFORMANCE EVALUATION PURSUANT TO MCL 38.83a(1)?

Respondent-Appellant says, "Yes."

Petitioner-Appellee says, "No."

II. WHETHER PETITIONER'S RECEIPT OF NOTIFICATION OF TERMINATION OF HER EMPLOYMENT UNDER MCL 38.83 AFFECTED RESPONDENT'S OBLIGATION TO ISSUE A YEAR-END EVALUATION UNDER MCL 38.83a(1)?

Respondent-Appellant says, "Yes."

Petitioner-Appellee says, "No."

PROCEDURAL BACKGROUND

On March 11, 2005, the Michigan Supreme Court issued an Order in the captioned matter stating as follows:

> On order of the Court, the application for leave to appeal the February 10, 2004 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), we direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed: (1) whether respondent failed to provide an annual year-end performance evaluation within the meaning of MCL 38.83a(1) and (2) whether the fact that petitioner was notified that her employment was terminated, pursuant to MCL 38.83, affected respondent's obligation to issue a year-end evaluation under MCL 38.83a(1). The parties may file supplemental briefs within 28 days of the date of this order.

In conformance with that order, Respondent-Appellant (hereinafter referred to as "Norway-Vulcan Area Schools" or "the District") responds to the questions presented.

ARGUMENT

I. RESPONDENT PROPERLY PROVIDED AN ANNUAL YEAR-END PERFORMANCE EVALUATION WITHIN THE MEANING OF MCL 38.83a(1).

The Respondent School District complied with its performance appraisal responsibilities in this matter. Article II, Section 3a(1) of the Teachers' Tenure Act ("Act"), MCL 38.83a(1) provides in pertinent part:

> If a probationary teacher is employed by a school district for at least 1 full school year, the controlling board of the probationary teacher's employing school district shall ensure that the teacher is provided with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher and that the teacher is provided with at least an annual year-end performance evaluation each year during the teacher's probationary period. The annual year-end performance evaluation shall be based on, but is not limited to, at least 2

> classroom observations held at least 60 days apart, unless a shorter interval between the 2 classroom observations is mutually agreed upon by the teacher and the administration, and shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan. This subsection does not prevent a collective bargaining agreement between the controlling board and the teacher's bargaining representative under Act No. 336 of the Public Acts of 1947, being section 423.201 to 423.216 of the Michigan Complied Laws, from providing for more performance evaluations or classroom observations in addition to those required under this subsection. Except as specifically stated in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.

As noted in the Respondent District's Application for Leave to Appeal filed with this Court, the State Tenure Commission ("Commission") rejected the Administrative Law Judge's ("ALJ") holding that an annual year-end performance evaluation could be issued any time after two observations at least sixty (60) days apart are held. The Commission reasoned that the ALJ's interpretation failed to give effect to the "year-end" language in Section 3a(1) rendering it "meaningless" (Commission Decision, p 12). Utilizing rules of statutory construction, the Commission held that a January 23rd, 2001 evaluation "does not comply with the year-end evaluation mandated by the Act." *Id.* It further stated:

> We hold, therefore, that the annual year-end performance evaluation should occur within a reasonable time of the May 1 unsatisfactory notice deadline to be in compliance with the statute's year-end mandate. Recognizing that school districts may have multiple probationary teachers to evaluate and limited administrative staff time to produce evaluations, it is to be expected that the annual year-end performance evaluations will have to be completed within a reasonable time in advance of the May 1 deadline. (*Id.* at p. 13)

In affirming the Commission decision, the Michigan Court of Appeals held at page 5 of its decision:

> Respondent contends that the evaluation prepared in January was sufficient to satisfy the "year-end" requirements of MCL 38.83a(1). Moreover, the tenure commission may not analyze respondent's reason for concluding that work is unsatisfactory, *Lipka v Brown City Comm Schs*, 403 Mich 554, 559-560; 271 NW2d 771 (1978), and the statute was not intended to remove the discretionary function from the school board. However, application of rules of statutory construction and the standard of appellate review precludes reversal of this case.
>
> The statute does not define the term "year-end." Random House Webster's College Dictionary (1997) defines "year-end" as "the end of a calendar year" and "occurring at year-end." Our Supreme Court has held that the school year ends on June 30th. *Ajluni v Bd of Educ,* 397 Mich 462, 465; 245 NW2d 49 (1976).

The Court of Appeals, however, did not define the term "year-end," but merely explained that dictionary definition describes that term as "end of the calendar year." The court also cited this Court's decision in *Ajluni, supra,* holding that the school year ends on June 30th. Without reconciling these different interpretations of the term "year end," however, the court, in reliance on the holding in *Ajluni,* then simply held that the January 23rd evaluation issued to Appellee Korri did not satisfy the year-end requirement without actually deciding the specific timeframe to which it refers.[1] The court explained that:

> Giving deference to the tenure commission's interpretation of the act, *Tomiak, supra*, there was competent, material and substantial evidence on the whole record to support the findings and application of law that an evaluation in January may not serve as the year-end evaluation for purposes of determining an employee's satisfactory performance. *Ferrario, supra.*
>
> (Decision, p 5).[2]

---

[1]The court did conclude that the year-end evaluation must be issued within a reasonable time of the May 1 deadline for nonrenewal.

[2]The Commission referred to the January 23rd evaluation as a "mid-year evaluation."

Thus, neither the Commission nor the Court of Appeals offered definitive guidance for interpreting the year-end performance evaluation requirement (other than a reasonable time in relation to the May 1st requirement). This vague standard creates considerable uncertainty about when a Michigan school district must issue the annual year-end performance evaluation. Indeed, this is an issue with significant ramifications to both Appellant District and Michigan public school districts because the failure to meet the year-end evaluation requirement, whatever it might be, can effectively force the District to retain an unsatisfactory probationary teacher in the event it allows that teacher to complete the school year.

The decisions of both the Court of Appeals and the Commission clearly state, however, that Section 3a(1) is ambiguous and that judicial construction of Section 3a(1) is required in order to prevent a school district from engaging in a useless act by literally interpreting its terms and issuing the evaluation at the end of the school year. The Commission said in this regard at page 11 of its Decision:

> The legal end of the school year is June 30th. *Ajluni v West Bloomfield Sch Dist Bd of Educ*, 397 Mich 462; 245 NW2d 49 (1976). Section 3 of the Tenure Act requires, however, that the controlling board provide a probationary teacher with a definite written statement as to whether or not his/her work has been satisfactory as least sixty (60) days before the close of each school year. Likewise, notice of termination of the services of a probationary teacher must occur at least sixty (60) days before the close of the school year. *Thus, if the "year-end" language is construed literally, the evaluation would be a useless act at that point as the determination of satisfactory or unsatisfactory service for the school year would already have been made.* (Italics added.)
>
> Because the ordinary meaning of the statutory language at issue is unclear, it is necessary to refer to rules of statutory construction.

The Court of Appeals, in affirming the Commission's decision and in considering "application of rules of statutory construction" (Decision, p 5), agreed that judicial construction of the year-end requirement in Section 3a(1) was necessary to reconcile the sixty (60) day notice requirement for unsatisfactory service with the year-end evaluation requirement. The District contends that while reference to statutory construction rules was proper, the statutory construction employed by the Commission and the Court of Appeals without consideration of the District's rationale for issuance of the unsatisfactory evaluation in January failed to consider overall objectives and purposes of the Act as have been articulated by the Michigan Courts.

In *Royal Oak School District v Schulman*, 68 Mich App 589, 593; 243 NW2d 673 (1976) the Michigan Court of Appeals, in construing an ambiguity contained in Article IV, Section 4 of the Act, MCL 38.104, observed that this Court held in *Smith v City Comm of Grand Rapids*, 281 Mich 235, 240-241; 274 NW 776 (1937) that any judicial construction of a statute must reasonably construe both its statutory purpose *and* objective, noting in this regard that:

> Where the language of a statute is ambiguous or of doubtful meaning it should be given a *reasonable construction* looking to the *purposes of the statute and the object sought to be accomplished. Smith v City Comm of Grand Rapids*, 281 Mich 235, 240-241; 274 NW 776 (1937). The Michigan Supreme Court has recognized that the Teachers' Tenure Act is to be interpreted in favor of the legislative purpose of *protecting teachers rights. Weckerly v Mona Shores Bd of Educ*, 388 Mich 731, 734; 202 NW2d 777 (1972). (Italics added.)[3]

[3]This Court has previously identified a number of legislative purposes underlying the Teachers' Tenure Act. For instance, in *Lipka v Brown City Comm Schs*, 399 Mich 704, 710-715; 252 NW2d 770 (1977), *on rehearing* 403 Mich 544; 271 NW2d 771 (1978), this Court, in holding that the Act does not require that a school board give reasons accompanying the notice of unsatisfactory work stated that:

The Court of Appeals, in reliance upon *Davis v Board of Educ of the Harrison Comm Schs*, 126 Mich App 89, 95; 342 NW2d 528 (1983), said at page 5:

> However, the act's primary purpose is to protect teachers from school district's arbitrary and capricious employment action.[4]

This Court reached a similar conclusion in *Rehberg v Board of Educ of Melvindale, Ecorse Sch Dist*, 330 Mich 541,548; 48 NW2d 142 (1951) stressing that the Act protects teachers from discharge or demotion and "places an additional safeguard upon their arbitrary or unreasonable dismissal of teachers." This precept was again restated by this Court in *Amato v Oxford Area Comm Sch Dist No 7*, 402 Mich 521, 526; 266 NW2d 445 (1978) "the intent of the entire Act was to eliminate capricious and arbitrary employment policies of local school boards. This includes the probationary as well as the tenure period of employment" [quoting from dissenting opinion in *Munro v Elk Rapids Schools*, 383 Mich 661, 691; 178 NW2d 450 (1970), *rev'd on rehearing*, 385 Mich 618; 189 NW2d 224 (1971)].

> [W]e further believe that this determination is consistent with the general purpose of the tenure act, which is to *resolve conflicts between the teacher and the board* without the necessity of court action, so long as it is consistent with the general principle that the Tenure Commission is not assuming powers reserved to the courts under the wording of the act or its reasonable interpretation. (Citation omitted.) (Italics added.)

[4]This holding is consistent with other Michigan court decisions. See, *Munro v Elk Rapids Schools*, 383 Mich 661, 689;178 NW2d 450 (1970), *rev'd on rehearing*, 385 Mich 618; 189 NW2d 224 (1971), the purpose of the Teachers' Tenure Act was "to limit a local school board's power in employment of teachers" and "maintain an adequate and competent teaching staff free from political and *personal arbitrary interference"* as quoted from *Ehret v Kulpmont Borough Sch Dist,* 333 Pa 518; 5 A2d 188 (1939) (emphasis added)*; Goodwin v Board of Educ of the Sch Dist of the City of Kalamazoo*, 82 Mich App 559, 573; 267 NW2d 142 (1978), "A major purpose of the Act was to eliminate *arbitrary* and *capricious* dismissals or demotions of teachers by boards of education." (Emphasis added.)

While there is no doubt that different purposes are served by various sections of the Act, there seems to be a consensus that an important objective of the Act is to protect a teacher from *arbitrary* and capricious *activity* by a school district and its board of education. In *Goolsby v City of Detroit*, 419 Mich 651, 679; 358 NW2d 856 (1984) this Court, in reliance upon *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946) and *Bundo v City of Walled Lake*, 395 Mich 679, 703; 238 NW2d 154 (1976) stated that the words "arbitrary" and "capricious" have generally accepted meanings noting:

> The United States Supreme Court has defined the terms as follows:
>
> > Arbitrary is: "Without adequate determining principle . . .. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasonable."
> >
> > Capricious is: "Apt to change suddenly; freakish; whimsical; humorsome."

The District submits, that in applying principles of statutory construction, the Commission and the Court of Appeals should have determined whether it was reasonable (*i.e.* not arbitrary and capricious) for the District to issue the annual year-end evaluation to Appellee Korri on January 23rd - some five (5) months after the school year had commenced.[5] Indeed, both tribunals recognized that the question of *reasonableness* does factor into this statutory interpretation question but neither addressed the reasonableness of the District's actions. Instead, those tribunals simply articulated a blanket rule that a year-end performance evaluation issue within a *reasonable* time

[5]In *Gross v General Motors Corp,* 448 Mich 147, 158-159; 528 NW2d 707 (1995), for instance, this Court held that the primary rule of statutory construction is to determine and effectuate the legislative intent through *reasonable* statutory construction methods in consideration of the purpose of the statute and the objective sought to be accomplished.

of the May 1st deadline and, without any analysis of the specific facts, held that a January evaluation did not meet the Act's requirements. Based upon principles of statutory interpretation adopted by this Court however, the question of the reasonableness of the District's action must be considered if any review of the timing of the year-end performance evaluation is to occur.

The District submits that, on the particular facts of this case, Appellee Korri's evaluation *did* issue in a manner required by the Act. Furthermore, even if this Court affirms the rule enunciated by the Commission and the Court of Appeals, the District submits that it met this requirement. The District points to undisputed record evidence establishing grounds for the District's actions. These include the fact that Appellee Korri simply refused to prepare lesson plans, telling her supervisor that preparation of these plans was "just the lazy way for teachers." (Hrg Tr, p 29.) She also refused suggestions to visit other teachers' classrooms and refused to implement curricular requirements. Incredibly, during one of the discussions between Appellee Korri and her Supervisor, Bertha Hommer, Korri made it very clear she would do as she pleased regardless of Hommer's directives. Further, Korri told Hommer that if she was unsatisfied with Korri's activities the District could find a new teacher. Ms. Hommer testified:

> Again, I asked if she [Korri] wanted to go to another classroom to visit to see what they are doing, and *she just didn't want to do it.* And after the discussion – there were several things – I just remember at the very end of the discussion – because we talked about the lesson plans and about the value of other – visiting classrooms and using teachers as resource people. And I basically at the very end told her that you need to start using those materials and change the lesson plans, and she left with the comment: *I think you need to look for – I think you need a new teacher.* Was the end comment she made to me. (Hrg Tr, pp 31-32.) (Italics added.)

It was Korri's stated refusal to comply with these directives to prepare lesson plans, to visit other teachers' classrooms, and to implement curricular requirements which led to her

unsatisfactory service evaluation, and ultimately her nonrenewal. Although Korri had displayed a series of other performance deficiencies in the preceding five months, the record makes it clear that Korri's stated refusal to implement District requirements caused Supervisor Hommer and the District's Superintendent, Mr. VanGasse, to justifiably conclude that Appellee Korri's performance was unsatisfactory. Indeed, not even Appellee Korri argues that the District erred in determining that her performance was unsatisfactory given her unwillingness to follow her supervisor's directives.

The District submits, therefore, that under the particular circumstances of this case, it was *reasonable (i.e. not arbitrary and capricious) for the District to conclude on January 23rd (five months after the start of that school year)* that Appellee Korri's performance was unsatisfactory. Once District officials reached that conclusion, they justifiably issued her the unsatisfactory evaluation which served as her annual year-end evaluation.

To summarize, the Commission and the Court of Appeals erroneously construed the year-end requirement with the sixty (60) day notice of nonrenewal requirement contained in Section 3(2) to arrive at the May 1st notice deadline as the statutory focal point emphasizing the "year-end" language, but completely ignored the reasonableness of the District's actions under the specific facts of this case. Further, these tribunals erroneously ignored the statutory purpose of the sixty (60) day notice requirement.[6] This Court, however, in *Lipka v Brown City Comm Schs, supra*, noted that *the purpose of that sixty (60) day notice requirement is to afford the teacher sufficient time to obtain other employment*. Likewise, in *Boyce v Royal Oak Bd of Educ*, 407 Mich 312, 318-

[6]Indeed at footnote 2 of p 5 of its decision, the Court of Appeals stated that it was "mindful that the disposition of this case may be deemed to exalt form over substance," referencing the fact that in the five months following establishment of Korri's IDP goals, Korri took no action to cure performance deficiencies.

320; 285 NW2d 196 (1979), this Court declared that the purpose of the sixty (60) day notice request was "to provide the probationary teacher with notice as to employment status for the ensuing year." This Court further observed that a teacher whose services are discontinued "is thereby afforded sufficient notice to seek other employment opportunities during the summer months where most of the hiring of teachers occurs." Viewed in this context, the January 23rd evaluation was reasonable under the circumstances because it gave Korri additional time to search for other employment thereby meeting the statutory objective of the sixty (60) day notice requirement. In this case, Appellee Korri received notice that her performance was unsatisfactory approximately three (3) months before the May 1st deadline.[7] Once the District's Administration made the decision that Korri had exhibited unsatisfactory service as of January 23rd, it had the right (and perhaps even the obligation) to notify Korri that her services would be discontinued.

The decision of the Court of Appeals and the Commission would hold, however, that *regardless* of the District's assessment of Korri's performance as of January 23rd, it simply could not *issue* the annual year-end performance evaluation until a reasonable time prior to the May 1st deadline, (whenever this might be). Finding that the January 23rd evaluation was not issued within this reasonable time frame, the Court of Appeals would apparently require that District officials

---

[7]In arguing the reasonableness of the January 23rd evaluation issued to Korri, the District pointed out that the Michigan Courts addressing the issue of reasonableness have consistently concluded that this determination requires consideration of the particular facts and circumstances of each case. See, *Appellant's Application for Leave* to Appeal, pp 19-20. Thus, the Commission and the Court of Appeals' failure to consider the relevant facts leading to the District's decision to issue the annual year-end evaluation on January 23rd, was erroneous and a departure from established precedent set forth above. However, the District has previously indicated in its Application for Leave to Appeal (pp 18-20) that consideration of the District's rationale for rating a probationary teacher's performance unsatisfactory is not subject to review by the Commission. See *Lipka v Brown City Comm Schs, supra.*

remain *silent* with regard to their conclusion of Korri's unsatisfactory service and simply wait until the proper time (*e.g.*, within a "reasonable" time of May 1st) to issue the annual year-end evaluation. This hardly serves to provide the teacher timely notice of the need to seek employment elsewhere - the objective of the sixty (60) day notice requirement.

Since the District had already completed two classroom observations of Appellee Korri held at least sixty (60) days apart, thereby meeting the observational requirements of Section 3a(1), all that was statutorily required of the District was to issue the annual year-end performance evaluation.[8] The Commission's decision clearly permits a school district to make a mid-year decision to identify a probationary teacher's performance as unsatisfactory. It says at page 14 . . . ["we note that the year-end evaluation requirement does not prevent a school district from terminating an unsatisfactory probationary teacher before the end of the school year."] Since the statute allows the District to make the *decision* that a teacher's work is unsatisfactory in January, there can be no reasonable interpretation of the Act which would require the District's administration to simply wait until the proper time to give the unsatisfactory evaluation to the teacher months after it makes its decision to rate the teacher unsatisfactory. Thus it is difficult to believe that the Legislature intended that probationary teachers have sixty (60) days advance notice of unsatisfactory service to enable them to find other work, but that those teachers cannot receive actual notice of that unsatisfactory service determination at the time it is made.

---

[8] The Act *only* requires that the annual year-end performance evaluation be preceded by and based on at least two classroom observations held at least 60 days apart. Once the second observation occurs, a school district is *not* required by the Act to conduct any further assessment of the teacher's performance. MCL 38.83a(1).

Appellee Korri may argue that the purpose underlying the annual year-end requirement was for the teacher to be entitled to receive, as nearly as possible, a full year of evaluation. The text of the Act and the decision of the Commission indicate this is clearly not the case. The Act states that once the second of the two statutorily required observations has been completed, no other observation or consideration of the teacher's performance is required. The only requirement is that the year-end evaluation issue and that it be based upon the two classroom observations held sixty (60) days apart (and, of course, assess the teacher's progress in meeting IDP goals). Notably, the Legislature could have easily required more observations or that those observations take place at particular times during the school year. The Legislature's failure to be more specific in this context confirms that it intended to leave such details of implementation to local boards of education.

Moreover, the Commission's observation that "the year-end evaluation requirement does not prevent a school district from terminating an unsatisfactory probationary teacher before the end of the school year" and that its holding "does not limit a school district from terminating an unsatisfactory probationary teacher at any time during the school year if necessary" is logically inconsistent with its ruling here that probationary teachers must have an entire school year to demonstrate satisfactory performance. If that were true, then an unsatisfactory teacher could not be removed before the end of the school year. (Commission Decision, pp 14-15.)

That being the case, the annual year-end performance evaluation requirement cannot be reasonably interpreted to mandate that probationary teachers be afforded the entire school year to demonstrate satisfactory service.

Finally, the interpretation of the Tenure Commission and the Court of Appeals will ultimately disadvantage probationary teachers by encouraging school districts to avoid the risks

associated with not providing the annual year-end evaluation within a reasonable time of the May 1st deadline. This will have the undesirable effect of depriving the unsatisfactory probationary teacher of the pay and benefits that that teacher would earn should the district elect to retain that teacher for the balance of the school year. This result will be inconsistent with the statutory objective of protecting teachers' interests.

The Commission and the Court of Appeals have struggled with the annual year-end evaluation requirement to attempt to give meaning to that language. It is evident, however, that such construction without consideration of the timing and rationale for issuance of the performance evaluation achieves a result that is unfair to teachers and school districts, effectively converting the year-end evaluation requirement, as the facts of this case indicate, to a perfunctory and futile exercise that this Court should not affirm.

II. PETITIONER'S RECEIPT OF NOTIFICATION OF TERMINATION OF HER EMPLOYMENT PURSUANT TO MCL 38.83 AFFECTED RESPONDENT'S OBLIGATION TO ISSUE A YEAR-END EVALUATION UNDER MCL 38.83a(1).

As discussed above, the Tenure Commission and the Court of Appeals both held that a school district may terminate an employee during the school year for unsatisfactory performance. However, when a school district elects to keep the employee, it must issue the annual year-end evaluation. This requirement, when applied to the facts of this case, creates an untenable and absurd result and fails to consider the requirements of the Act and the realities of teacher

evaluation.[9] The Appellant contends that no annual year-end evaluation should be required in this instance.

Here, Appellee Korri was informed that her employment contract would be nonrenewed due to her unsatisfactory service as evidenced by her January 23rd evaluation. That evaluation, the District contends, constituted her annual year-end evaluation within the meaning of Section 3a(1) of the Act. Assuming, however, that it was not, the District submits that there would be no legitimate basis to give a second annual year-end evaluation months later to a teacher who has already received notice of unsatisfactory service and who, as of February (at least in this case) has already received her notice of nonrenewal. Furthermore, since Korri's January 23rd unsatisfactory evaluation was based upon at least two classroom observations held at least sixty (60) days apart, then school administrators and this Court might reasonably question what additional information would be contained in the annual year-end evaluation since it too must be based on at least two classroom observations held at least sixty (60) days apart. Presumably, the year-end evaluation would simply reiterate the conclusions reached in the earlier evaluation since the Act requires no additional monitoring or observations of the probationary teacher's performance or activities.

The District therefore submits that nothing is to be accomplished by simply reiterating the substance of the so-called mid-year evaluation in the annual year-end evaluation. This is

[9]In fact, teacher evaluation is a mandatory bargaining subject. *See Central Michigan Univ Faculty Assoc v Central Michigan Univ*, 404 Mich 268, 278; 273 NW2d 21 (1978). Thus, the question of when the annual year-end evaluation should issue and what its contents are, should be left to collective bargaining negotiations.

particularly true, where, as here, the employee has already been notified that her contract would not be renewed and the Board has already issued the notice of nonrenewal.[10]

Both the Tenure Commission and the Court of Appeals declined to literally interpret the year-end requirement contained in Section 3a(1) because strict compliance would require a useless act. This determination was in keeping with settled rule of construction that a statute will not be interpreted to require an absurd result. For instance, in *Boyce v Royal Oak Bd of Educ, supra*, at p 320, this Court observed the Act does not require a school board to "indulge in idle ceremonies." For the same reason, the Tenure Commission and the Court of Appeals held here that there is no need to provide a year-end performance evaluation to a probationary teacher who is terminated mid-year because the teacher is not there to evaluate. The same rationale applies in this situation because Korri, like the probationary teacher who is terminated mid-term, has no reasonable expectation of continued employment. Thus, as a practical matter, an attempt to distinguish Korri's situation from the teacher who is terminated mid-term is a distinction without a difference.

Finally, in view of this Court's prior pronouncements that the Act is to be interpreted in favor of teacher protection, the decisions of the Commission and the Court of Appeals utterly fail to advance this objective for two reasons.

First, these decisions encourage school districts to terminate unsatisfactory probationary teachers mid-term rather than take the risk that the annual year-end evaluation might not be found to have been issued within a reasonable time frame of the May 1st deadline (whenever that might be and however it might be determined). Here, the District elected to keep Korri on through the

---

[10]This also brings into question whether the District could simply satisfy its obligation under the Act by copying mid-year evaluation and handing it to the teacher by the May 1st deadline. To interpret the Act in that fashion would clearly require the performance of an absurd act.

remainder of the school year which clearly benefitted her from a financial perspective. It also avoided disruption to the students' classes and allowed the District the following summer to hire a replacement for Korri, thereby avoiding a rush to hire a replacement mid-year. If the decisions of the Tenure Commission and the Court of Appeals are allowed to stand, the great temptation for school districts will be to remove probationary teachers sooner rather than later, thereby avoiding the exceedingly harsh consequence of being forced to continuously employ an unsatisfactory teacher.[11] This will not serve the interests of probationary teachers or their students.

Second, the decision encourages (and in fact mandates) that school officials who have already determined to nonrenew a probationary teacher's contract wait until the last possible minute to issue the unsatisfactory evaluation in order to avoid the result in this case, even though candor, fairness and prudence might dictate otherwise. In effect the Tenure Commission's ruling institutionalizes "sandbagging" in the critical area of teacher performance assessment. This likewise operates in derogation of the intent underlying the sixty (60) day notice requirement to give the teacher advance notice in order to obtain other employment.

CONCLUSION AND RELIEF REQUESTED

The decisions of the Tenure Commission and the Court of Appeals reach an untenable result for probationary teachers, who the Act seeks to protect, and for Michigan school districts. The Act has been subject to judicial construction on numerous occasions given the ambiguities in its text. In such cases, Michigan courts have endeavored to achieve a reasonable interpretation of its terms by construing the Act in light of its legislative purpose. In *Wilson v Flint Bd of Educ,*

---

[11]It is indeed ironic that under existing law an unsatisfactory teacher achieves tenure both when an evaluation does not issue at all, *Wilson v Flint Bd of Educ*, 361 Mich 691; 106 NW2d 136 (1960), and when it issues too soon, as here.

supra at p 696, this Court observed, in addressing the consequences of a school district's failure to afford a teacher notice as to whether or not his/her work was satisfactory: ". . . [t]he policy of the state is not to leave a matter of such vital concern to all interested parties in the realm of debate."

The interests of Michigan public school districts and their students simply are disserved when ambiguous statutory wording is interpreted and applied to require the continuation of an unsatisfactory teacher in employment, with tenure, either because an evaluation was issued too early or because a second evaluation that serves no meaningful purpose was not issued. Ultimately, probationary teachers are advantaged by receiving their evaluations and notice of unsatisfactory service sooner rather than later so that they can find other suitable work and are allowed to complete the school year, rather than being terminated mid-year. This result is consistent with the prevailing policy related to the nonrenewal notification of probationary teachers articulated in the precedent of this Court.

The District requests that this Court adopt its position and, pursuant to MCR 7.302(G)(1), reverse the decisions of the Commission and the Court of Appeals and conclude that the District's actions were not violative of the Act.

Respectfully submitted,

THRUN LAW FIRM, P.C.
Attorneys for Norway-Vulcan Area Schools

Dated: April 8, 2004

By: _____
Robert G. Huber (P36092)
BUSINESS ADDRESS:
501 S. Capitol Avenue, Suite 500
P.O. Box 40699
Lansing, Michigan 48901-7899

S:\USERS\RGH\NORWAY-VULCAN\Korri\Supplemental Brief.wpd